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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LIBERTARIAN PARTY OF FLORIDA, an unincorporated association, ALAN TURIN, WILLIAM MARINA, DOUG RAMSAY, and ED CLARK,

Petitioners,

vs.

STATE OF FLORIDA, GEORGE FIRESTONE, as Secretary of State and Chief Election Officer of the State of Florida, BETTY CARTER, as Supervisor of Elections of Orange County, JANE CARROLL, as Supervisor of Elections of Broward County, and DAVID LEAHY, as Supervisor of Elections of Dade County,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THE STRICT SCRUTINY TEST IS TO BE APPLIED TO MINOR POLITICAL PARTY BALLOT ACCESS CASES?

II. UPON A FINDING THAT THE BALLOT ACCESS PROVISIONS FOR MINOR POLITICAL PARTIES ARE UNDULY BURDENSOME WHETHER THE STATE OF FLORIDA MUST SHOW THAT IT HAS A COMPELLING STATE INTEREST IN RESTRICTING BALLOT ACCESS AS SUCH, AND WHETHER THE STATE OF FLORIDA MUST SHOW THAT IT HAS ADOPTED THE LEAST DRASTIC METHOD OF RESTRICTING BALLOT ACCESS.

III. WHETHER THE STATE OF FLORIDA HAS AN UNDULY BURDENSOME BALLOT ACCESS SCHEME WITH RESPECT TO MINOR

POLITICAL PARTIES FOR THE FOLLOWING REASONS:

a. The number of petition signatures, totalling approximately 144,000, is more than twice the number of petition signatures required for minor political parties in any other state in this country.

b. Even if a minor political party wishes to field only local candidates, it must still obtain a three percent statewide petition.

c. Even if a minor political party obtains the three percent petition requirement in any election year, it must still

requalify for each and every election.

d. A large number of petition signatures cannot be obtained in one locality but must instead be gathered throughout the rest of the geographical areas in the State of Florida, regardless of whether the candidate fielded is running for a local or statewide office, making it unduly burdensome within the meaning of McClain v. Meier, 637 F.2d 1159 (8th Cir. 1980).

e. The Florida Election Code does not include a provision to obtain permanent ballot access by polling a percentage of the vote in the last election.

f. The three percent petition requirement is impossible to meet.

g. The five percent voter registration requirement is impossible to meet because voter registration drives cannot be met without being able to have access to the ballot in the first place.

h. The cost of the three percent petition drive is approximately $250,000.00.

V. WHETHER THE STATE OF FLORIDA CAN PERMIT MUCH LESS STRINGENT PETITIONING REQUIREMENTS FOR INDEPENDENT CANDIDATES THAN FOR MINOR POLITICAL PARTY CANDIDATES.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit which is recorded at 710 F.2d 790 (11th Cir. 1983) and is set forth in the Appendix to this Petition. The Memorandum Opinion of the United States District Court for the Middle District of Florida is set forth in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 29, 1983. A timely petition for rehearing was denied on March 12, 1984. The jurisdiction of this court is invoked under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes challenged by Petitioners are secs. 99.096, 97.021(14), 99.0955, 99.103, 103.021, 100.111, 100.061, 100.071, 100.081, 100.091, 100.096, 100.101, 100.102, 101.021, 103.021, 103.101, Fla. Stat. (1983) and are set forth in the Appendix to this Petition.

The Petitioners' challenge is based on the First and Fourteenth Amendments to the United States Constitution. These constitutional provisions provide in pertinent part:

First Amendment

> Congress shall make no law ... abridging the freedom of speech ...

or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Fourteenth Amendment

No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the Unites States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, Libertarian Party of Florida, together with the other Petitioners, sued the Respondents in the United States District Court for the Middle District of Florida for injunctive and declaratory relief. The Petitioners requested that the District Court find that the Florida Election Code is unconstitutional as applied to the Petitioners within the meaning of the First and Fourteenth Amendments of the United States Constitution, and that it enter its order, both temporary and permanent, restraining the Respondents from requiring the Petitioners to comply with the provisions of the Florida Election Code which restricted their access to the ballot. The Petitioners also requested the Court to permit the

Petitioners unlimited access to the ballot in all elections in the State of Florida.

The Petitioners are attacking primarily the petitioning requirements and those portions of the Florida Election Code that exclude minor political parties from the various election processes. In the District Court the Petitioners were asking specifically:

1. That the Court declare sec. 99.096, Fla. Stat. (1981) unconstitutional within the meaning of the First and Fourteenth Amendments to the United States Constitution. These provisions are discriminatory in that:

(a) The 3% petitioning requirement which presently requires 144,292 signatures is on its face burdensome and onerous.

(b) The 3% petitioning requirement must be satisfied by a minor political party candidate for a district election as well as a statewide election.

(c) A minor political party candidate is required to obtain the 3% statewide petition for a district election, but an independent candidate, and a major political party candidate, are not required to do this.

2. That the Court enter its order declaring sec. 103.021 Fla. Stat. (1981) unconstitutional in that the petition signature requirements in said section for minor political party presidential candidates are unduly burdensome and oppresive and are in violation of the First and Fourteenth Amendments to the United States Constitution.

3. That the Court enter its order declaring sec. 99.103 Fla. Stat. (1981) unconstitutional in that it does not provide for remission of any filing fee paid by minor political party candidates although it allows for remission to either the democratic or republican party candidates.

4. That the Court enter its order declaring sec. 100.111 Fla. Stat. (1981) unconstitutional in that it specifically excludes minor political party candidates from the procedure of filling vacancies in political offices under certain circumstances by a special election.

5. That the Court enter its order declaring secs. 100.061, 100.071, 100.081, 100.091, 100.096, 100.101, 100.102 and 101.021 Fla. Stat. (1981) unconstitutional on the ground that these sections do not provide for the

participation of minor political parties such as the Petitioner Libertarian Party of Florida in primary elections. These sections also prohibit electors registered as other than democratic or republican voters from voting in the primary elections.

6. That the Court enter its order declaring sec. 103.021 Fla. Stat. (1981) unconstitutional in that it provides that the governor shall nominate presidential electors for United States presidential elections from only the democratic and republican parties. Minor political parties are excluded from this process.

7. That the Court enter its order declaring sec. 103.101 Fla. Stat. (1981) unconstitutional in that this section specifically excludes minor political parties such as the Petitioner Libertarian Party of Florida from

presidential preference primaries.

8. That the Court enter its order declaring sec. 103.091 Fla. Stat. (1981) unconstitutional in that this section provides that the democratic and republican parties shall be represented by state executive commitees but it makes no such provision for minor political parties such as the Petitioner Libertarian Party of Florida.

9. That this Court enter its order declaring Ch. 101 Fla. Stat. (1981) unconstitutional in that this chapter permits only the democratic and republican parties unlimited access to the voting machinery of the State of Florida. This is in violation of the First and Fourteenth Amendments to the United States Constitution. Those citizens and electors such as the Petitioners herein who are Florida

residents are denied equal access to the election machinery although they are taxed along with all other citizens of Florida in order to provide funds for the establishment and maintenance of the election machinery throughout the State.

The testimony showed that it was virtually impossible for the Libertarian Party of Florida to satisfy even the one percent statewide petitioning requirement for the 1980 presidential election. The Libertarian Party of Florida was completely unable to meet the three percent petitioning requirement.

The testimony showed that the three percent petitioning requirement must be met for each and every election, that there is no provision for obtaining permanent ballot access once the three percent petitioning requirement is met, and that there is no means of ballot

access in the State of Florida by polling a certain percentage of the last vote as there is in most other states. The testimony also showed that Florida does not permit obtaining a large portion of the petition signatures in one geographical locality; it is necessary to go throughout the entire state.

The testimony showed that the libertarian party throughout the country had some one thousand (1,000) candidates. It has also had presidential candidates in the last three presidential races. The testimony showed that the libertarian party is a genuine party movement and not an independent candidacy based around one certain person such as John Anderson or George Wallace.

The testimony showed that while the libertarian candidates could always register as independents and be able to

obtain ballot access by having only a district-wide petition drive which in many cases would have been relatively simple, those candidates choosing to remain libertarians were faced with considerable barriers. The testimony showed that the ballot access barriers in the state of Florida made it impossible for the petitioners to vote for the candidates of their choice.

The only testimony of the Respondents of any significance was that to allow minor political parties ballot access in the state of Florida would cost additional monies in order to provide places on the ballot. Otherwise, there was no testimony whatsoever of how the state has adopted the least drastic method of controlling ballot access, nor was there any testimony or evidence of a compelling state interest.

REASONS FOR GRANTING THE PETITION

A candid review of the opinion of the district court above and of the Eleventh Circuit, copies of which are in the Appendix, clearly reveals that those two courts used the rational basis test. The rational basis test is the wrong test to apply. The Eleventh Circuit has taken the position that, basically, the State of Florida can do anything it wants with respect to limiting ballot access.

The Eleventh Circuit, as well as the district court in this case, applied the wrong test. The proper test is the "strict scrutiny test" required by Clements v. Fashing, 102 S.Ct. 2836 (1982), and Anderson v. Celebreeze, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

Not only are basic voting rights arising under the First Amendment to the

United States Constitution involved, so is the First Amendment right to freedom of association. The testimony and evidence presented at the trial in this case unquestionably show that there is a burden or prior restraint which is unduly burdensome in the state of Florida upon the exercise of the fundamental First Amendment freedoms with which we are dealing.

Once that burden or restraint is shown by the complaining party, as the testimony showed here, the responsibility then shifts to the state to show what compelling interest it has in imposing such severe restrictions upon the exercise of First Amendment freedoms. The state must also show that it has adopted the least drastic method in achieving its ends in regulating elections, and that it has not gone

beyond what the state's compelling interest actually requires. Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979), McClain v. Meier, 637 F.2d 1159 (8th Cir. 1980).

The only testimony by the Respondents to show what the compelling state interests were asserted that there would be additional costs in putting someone else on the ballot and that there would be a flood of candidates. However, the state failed to show what the costs were and how much the total would be; it neither substantiated or quantified its assertion.

No court has ever held that the imposition of a cost upon a state can justify a burdensome restriction on the exercise of First Amendment rights. And no court has found the "flood of

candidates" issue to be any more than theoretically imaginable. Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 84 (1968).

On the question of the unequal treatment of minor political party candidates and independent candidates running for local office, in that minor political candidates must first have their party qualify statewide before they can run local races while local independents need only petition locally, the state and the Respondents have shown no justification at all for such treatment. There is no logical distinction that will satisfy even the "rational basis test", let alone the "strict scrutiny test". Such unequal treatment violates the Fourteenth Amendment. Illinois State Board of Elections v. Socialist Workers Party,

supra; Moore v. Ogilvie, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969).

The District Court and the Eleventh Circuit relied upon Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1976, 19 L.Ed.2d 554 (1971). Jenness is radically different.

The Plaintiffs in Jenness were all candidates. There was no minor political party as a Plaintiff in that case, and there was no attack upon a statutory scheme for purportedly barring access to the ballot to a minor party. The Court in Jenness was construing the Georgia Election Code, where a person could get on the ballot by winning the democratic or republican party primary, but was otherwise relegated to obtaining petition signatures or utilizing other means to run for office.

The attack made by the Plaintiffs in

Jenness was upon the overall method to get on the Georgia ballot, whether as a major political party candidate or otherwise. This is not the same as the attack made by the Petitioners herein in which they were prevented from getting on the Florida General Election Ballot.

In Jenness the petitioning requirements were totally different from Florida's. The petitioning requirement was to obtain signatures from five percent of those eligible to vote for a particular office in the last election. This meant that a local or district candidate would only have to obtain petitions locally. This is vastly different from the Libertarians who in Florida must have their party qualify in the entire state in order to run for local or district office.

Also different was that the petition

signatures in Georgia did not have to be of a registered voter. The only qualifications for the petition signature were that the person must have been eligible to vote for that particular office in the last election. This greatly simplified the petitioning process and made whatever verification necessary very easy.

Another distinction is that the total number of petition signatures required in Georgia was less than half of that in Florida, as established through the testimony at trial. This was, of course, brought out through the testimony of Richard Winger who testified for the Petitioners below.

The District Court and the Eleventh Circuit also refer to Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). There was reference to a

statement in the Storer opinion whereby the Court noted that gathering three hundred twenty five thousand signatures in twenty four days would not appear to be an impossible burden.

The opinion of the Eleventh Circuit then refers to the cases of Beller v. Kirk, 328 F.Supp. 485 (S.D. Fla. 1970).

These cases all applied the rational basis test. When these cases are read, it is evident that there is ample reference to terms such as "reasonable", "rational", and "possible". The fact that it is possible to obtain the petition signatures does not satisfy the strict scrutiny test. Of course, anyone in Florida with at least two hundred fifty thousand dollars ($250,000.00) and the manpower could obtain the necessary signatures to satisfy the three percent requirement. But that misses the point.

Florida's Election Code, so construed, places the burden on the First Amendment rights. The State at that point has to show that it has used the least drastic method in regulating elections. The District Court has completely overlooked this.

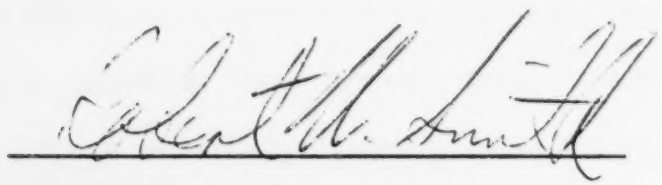
Also, with reference to the Storer opinion, it should be noted that the appendix to that opinion disclosed alternative means of getting on the ballot in California, most of which did not appear to be unduly burdensome. Accordingly, that case is distinguishable.

Also, the cases relied upon by the District Court tend to be anachronistic and do not reflect the trend to be more liberal in opening up the electoral process to independents and new political parties. For example see Clements v.

Fashing, supra; Illinois State Board of Elections v. Socialist Workers' Party, supra; McClain v. Meier, supra; Anderson v. Celebreeze, supra.

CONCLUSION

Petitioners pray that the Supreme Court issue a Writ of Certiorari directed to the United States Court of Appeals for the Eleventh Circuit to review the judgment of the Court of Appeals herein.



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APPENDIX

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A1

LIBERTARIAN PARTY OF FLORIDA, an unincorporated association, Alan Turin, William Marina, Doug Ramsey and Ed Clark, Plaintiffs-Appellants,

v.

STATE OF FLORIDA, George Firestone, as Secretary of State & Chief Election Officer of the State of Florida, et al., Defendents-Appellees.

No. 82-5617

United States Court of Appeals,

Eleventh Circuit.

July 29, 1983

Libertarian party of Florida, its chairman, and others brought suit challenging the statutory petition requirements minority party candidates must meet under Florida law to qualify for statewide and local ballot positions. The United States District Court for the Middle District of Florida,

Elizabeth A. Kovachevich, J., held the statutes constitutional, and plaintiffs appealed. The Court of Appeals, Roney, Circuit Judge, held that Florida's election code, which provides that a minor political party may have the names of its candidates for statewide office printed on the general election ballot if a petition requesting that the party be assigned a position on the ballot is signed by three percent of the state's registered voters, does not constitute an impermissable burden and prior restriant in violation of the First and Fourteenth Amendments, nor does it invidiously discriminate against minor political parties in violation of the equal protection clause of the Fourteenth Amendment.

Affirmed.

1. Constitutional Law - 90.1(1),

225.2(2), 274.2(2)

Elections - 22

Florida's election code, which provides that a minor political party may have the names of its candidates for statewide office printed on the general election ballot if a petition requesting that the party be assigned a posistion on the ballot is signed by three percent of the state's registered voters, does not constitute an impermissible burden and prior restraint in violation of the First and Fourteenth Amendments, nor does it invidiously discriminate against minor political parties in violation of the Fourteenth Amendment. U.S.C.A. Const.Amends. 1, 14; West's F.S.A. sec. 99.096(1).

2. Elections - 15

State has a compelling interest in regulating the election process and

avoiding voter confusion.

3. Elections - 22

States - 4.2

States are free to adopt differing means of regulating ballot access, as long as the particular scheme is not unnecessarily burdensome.

4. Elections - 22

Requirements that a request for ballot access be supported by some significant number or percentage of petitioners are valid.

5. Elections - 22

In regard to challenges to ballot access laws, a court must determine whether the challenged laws "freeze" the status quo by effectively barring all candidates other than those of the major parties and provide a realistic means of ballot access; the focal point of the inquiry is whether a reasonably diligent

candidate can be expected to satisfy the signature requirements.

6. Elections - 22

In regard to challenges to ballot access laws, the test is whether the legislative requirement is a rational way to meet the compelling state interest of regulating the election process and avoiding voter confusion; the least drastic means test becomes one of reasonableness, i.e. whether the statute unreasonably encroaches on ballot access.

7. Elections - 22

Florida's three percent petitioning requirement, in regard to ballot access for minority party candidates, was not unconstitutionally burdensome simply because the majority of states protect interests similar to Florida's by imposing a lesser requirement. U.S.C.A. Const.Amends. 1, 14; West's F.S.A. sec.

99.096(1).

8. Constitutional Law - 67, 70.1(1)

A court is no more free to impose the legislative judgements of other states on a sister state than it is free to substitute its own judgement for that of the state legislature.

9. Elections - 22

Florida's procedures, in regard to ballot access for minority political parties, are not impermissibly burdensome as to cost. West's F.S.A. sec.sec. 99.096(2), 99.097(1)(b), (4).

10. Constitutional Law - 225.2(2)

Elections - 22

That minor parties must incur some expenses in accumulating the necessary signatures to qualify for the ballot does not constitute an equal protection violation. West's F.S.A. secs. 99.096(2), 99.097(1)(b), (4); U.S.C.A.

Const.Amend. 14.

11. Elections - 22

Qualitative differences between an independent candidacy and a party candidacy justifies differences in treatment.

12. Elections - 22

With an independent candidate, a state is free to assure itself that he or she is "truly independent."

13. Elections - 22

When candidates list a party affiliation, the voters and the state are entitled to some assurance that the particular party designation has some meaning in terms of a "statewide, ongoing organization with distinctive political character."

14. Constitutional Law - 42.1(1)

In suit challenging the validity of the petitioning requirements minority

party candidates must meet to qualify in Florida for statewide and local ballot positions, an individual who was a resident of Florida, who ran for the United States president in 1980 as the Libertarian party's candidate, who was on the ballot in Florida, but who testified at trial that he not presently a member of the Libertarian party of Florida, is not presently a candidate for office in Florida or anywhere, and has no present intent to run for office again, was properly dismissed from the suit for lack of standing; he did not allege such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction.

15. Federal Civil Procedure - 103

Standing is an aspect of justiciability under Article III of the United States Constitution. U.S.C.A.

Const. Art. 3, sec. 1 et seq.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

RONEY, Circuit Judge:

[1] This is a ballot access case. Plaintiffs sought a declaratory judgement and preliminary injunction alleging that Florida's Election Code, primarily its 3% statewide petition requirement, constitutes as impermissible burden and prior restraint in violation of the first and fourteenth amendments, and invidiously discriminates against them in violation of the equal protection clause of the fourteenth amendment. The district court held the statutes constitutional. On appeal, the plaintiffs contend the district court

erred in applying an incorrect level of scrutiny to appraise the challenged statutes, and argue the state has not adopted the least drastic means to regulate ballot access. Applying what appears to be rather settled law, we affirm.

Plaintiffs include the Libertarian Party of Florida (the Party), which qualifies as a minor political party under Florida law, Fla.Stat.Ann. sec. 97.021(14)(West 1982), and its chairman, Doug Ramsey. Other plaintiffs are party members who ran for public office in the November 1982 elections: Alan Turin, candidate for the state legislature; William Marina, candidate for statewide office; and Ed Clark, candidate for United States President.

Fla.Stat.Ann sec. 99.096(1)(West

All
1982)[1] provides that a minor political party may have the names of its

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1. The petitioning requirements minority party candidates must meet to qualify for statewide and local ballot positions are as follows:

> A minor political party may have the names of its candidates for offices which are elected on a statewide basis printed on the general election ballot in an election in which one or more of those offices will be filled if a petition requesting that the party be assigned a position on the general election ballot is signed by 3 percent pf the registered electors of the state, as shown by the compilation by the Department of State for the last preceding general

candidates for statewide office printed on the general election ballot if a

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election. A minor political party may have the names of its candidates for offices which are elected on less than a statewide basis printed on the general election ballot in an election in which one or more of those offices are to be filled if such party has qualified by petition to have a slate of candidates for offices elected on a statewide basis printed on the ballot and if such petition requesting that the party be assigned a position on the general election ballot is signed by 3 percent of the registered electors of the district, county, or other geographical entity represented by the office, as shown by the compilation by the Department of

petition requesting that the party be assigned a position on the ballot is signed by 3% of the state's registered voters. If the party thus qualifies to have candidates for statewide office, it may have the names of its candidates for local offices printed on the general election ballot by filing a petition requesting that the party be assigned a position on the general election ballot signed by 3% of the registered voters of the geographic entity represented by the office.

To have its candidates listed by party affiliation on the november 1982 ballot, the Party had to satisfy the 3% statewide petition requirement by

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State for the last preceding general election.

Fla.Stat.Ann. sec. 99.096(1) West 1982).

gathering the signatures of 144,492 voters.

[2] Plaintiffs concede, as they must, that the state has an interest in regulating the election process and avoiding voter confusion. That these, and other interests asserted, are compelling has been well established under decided cases. Lubin v. Panish, 415 U.S. 709, 715, 94 S.Ct. 1315, 1319, 39 L.Ed.2d 702 (1974); American Party of Texas v. White, 415 U.S. 767, 782 n. 14, 94 S.Ct. 1296, 1307 n. 14, 39 L.Ed.2d 744 (1974); Bullock V. Carter, 405 U.S. 134, 145, 92 S.Ct. 849, 857, 31 L.Ed.2d 92 (1972). The Supreme Court stated in Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971), that a state has an important interest "in requiring some preliminary showing of a significant modicum of support before

printing the name of a political organization's candidate on the ballot -- the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." Id. at 442, 91 S.Ct. as 1976.

The question presented is whether Florida has chosen "the least drastic means" to protect those interests. At the outset, we note that the Supreme Court has already affirmed a district court decision upholding the constitutionality og Florida's 3% statewide requirement as applied to minority parties. Beller v. Kirk, 328 F.Supp. 485 (S.D.Fla.1970), aff'd mem., 403 U.S. 925, 91 S.Ct. 2248, 29 L.Ed.2d 705 (1971). Cf Anderson v. Celebreezze, ---- U.S. ----, ---- n. 5, 103 S.Ct. 1564, 1567-1568, n. 5, 75 L.Ed.2d 547

(1983) (precedential effect of summary affirmance extends only to precise issues presented and necessarily decided). If that case does not control the outcome of this case, analysis of the other Supreme Court ballot access cases does.

[3,4] A review of the various statutory schemes upheld by the Court supports the view that states are free to adopt differing means of regulating ballot access, as long as the particular scheme is not unnecessarily burdensome. Compare Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554; Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); and American Party of Texas v. White, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974). The Court has clearly upheld requirements that a request for ballot access be supported by some significant number or percentage of

petitioners. Storer v. Brown, 415 U.S. at 740, 94 S.Ct. as 1284 (5% requirement not facially unconstitutional); American Party of Texas v. White, 415 U.S. at 783 & n. 15, 788-789, 94 S.Ct. at 1307 & n. 15, 1309-1310 (upholding statute imposing on minority parties "lenient" 1% requirement which was coupled with other "somewhat burdensome" requirements,and requiring independent candidates to obtain signatures of 3% or 5% depending of office); Jeness v. Fortson, 403 U.S. at 432, 442, 91 S.Ct. at 1976 (5% of those eligible to vote in previous election is constitutional).

[5,6] Obviously any percentage or numerical requirement is "necessarily arbitrary." American Party of Texas v. White, 415 U.S. at 783, 94 S.Ct. at 1307. Once a percentage or number of signatures is established, it would

probably be impossible to defend it as either compelled or least drastic. At any point, probably a fraction of a percentage point less, or a few petitioners less would not leave the interests of the state unprotected. Any numerical requirement could be challenged and judicially reduced, and then again, and again until it did not exist at all. This is not the thrust of the Court's teachings, however. Rather, a court must determine whether the challenged laws "freeze" the status quo by effectively barring all candidates other than those of the major parties, Jenness v. Fortson, 403 U.S. at 439, 91 S.Ct. at 1974, and provide a realistic means of ballot access. American Party of Texas v. White, 415 U.S. at 783, 94 S.Ct. at 1307. The focal point of this inquiry is whether a "reasonably diligent []

candidate [can] be expected to satisfy the signature requirements". Storer v. Brown, 415 U.S. at 742, 94 S.Ct. at 1285. Thus, the test is whether the legislative requirement is a rational way to meet this compelling state interest. The least drastic means test becomes one of reasonableness, i.e., whether the statute unreasonably encroaches on ballot access. See Anderson v. Celebrezze, -- U.S. at -- & n.9, 103 S.Ct. at 1570 & n. 9 (1983) (state's important regulatory interests are generally sufficient to justify reasonable restrictions). An examination of the Florida statute demonstrates that it does not.

[7,8] First of all, the argument that Florida's 3% requirement must be stricken as unconstitutionally burdensome beccause a majority of states protect interests similar to Florida's by

imposing a lesser requirement is unavailing. See Beller v. kirk, 328 F.Supp. at 486. A court is no more free to impose the legislative judgments of other states on a sister state than it is free to substitute its own judgment for that of the state legislature. Storer v. Brown, 415 U.S. 729-30, 736, 94 S.Ct. 1278-1279, 1282.

As did the district court, we note those parts of the Florida statute that ease a party's ability to obtain signatures. The Florida Election Code places no restrictions on who can sign a petition other than requiring that a signer be a registered voter. Thus, a person can sign regardless of party affiliation. Florida does not prohibit those who have previously voted in another party's primary from signing a petition, contrary to other states whose

schemes have been upheld. See Storer v. Brown, 415 U.S. at 727, 741, 94 S.Ct. at 1277, 1284 (California); American Party of Texas v. White, 415 U.S. at 785-86, 94 S.Ct. at 1308-1309 (Texas).

Neither does Florida preclude a voter from signing a petition if he or she has previously signed that of another party. See Socialist Workers Party v. Rockefeller, 314 F.Supp. 984, 997 (S.D.N.Y.) (upholding New York law providing that a person may not sign a nominating petition if he or she has signed a petition of another candidate for same office), aff"d mem., 400 U.S. 806, 91 S.Ct. 65, 27 L.Ed.2d 38 (1970).

There are no geographical limitations on the number of signatures which can be gathered from a certain area. A party can thus concentrate its petition efforts in populated areas. Cf. Moore v.

Ogilvie, 394 U.S. 814, 818-19, 89 S.Ct. 1493, 1495-1496, 23 L.Ed.2d 1 (1969) (striking down on one-person-one-vote principles Illinois law requiring 25,000 signatures, which had to include 200 signatures from each of at least 50 counties).

Florida imposes no limit on the number of signatures a party may submit in its effort to meet the 3% requirement. Plaintiffs estimated they needed one-and-a-half times the 144,492 signatures required, or 220,000 signatures, to ensure they had enough valid signatures under sec. 99.096(1). See Storer v. Brown, 415 U.S. at 738, 94 S.Ct. at 1283 (California law required petition's signature to total at least 5% but not more than 6% of vote cast in preceding general election). There are 4.8 million voters registered in Florida,

each of whom may sign a petition without restriction.

Under the Florida statute, the Party had from January 12 to September 7, 1982, or 188 days, to conduct its petitioning effort. The time given to gather signatures compares favorably to those previously found permissible. See Jenness v. Fortson, 403 U.S. at 433, 91 S.Ct. at 1971 (180 days); Storer v. Brown, 415 U.S. at 739-40, 94 S.Ct. at 1283-1284 (24 days); American Party of Texas v. White, 415 U.S. at 786, 94 S.Ct. at 1308 (55 days).

In both 1974 and 1976, the American Party qualified its slate of candidates by meeting the 3% requirement, thus demonstrating that Flroida law does not freeze the status quo but provides a realistic means of access.

Some of the plaintiffs in this case

testified they had not even attempted to undertake a petition drive because in their view the 3% requirement simply was impossible to meet. Plaintiffs failed to present factual evidence that they were precluded from obtaining ballot status by the challenged regulations. Conclusory allegations cannot prevail. American Party of Texas v. White, 415 U.S. at 781, 790, 94 S.Ct. at 1306, 1310.

[9,10] Florida's procedures are not impermissibly burdensome as to cost. Florida provides petitions free of charge. Fla. Stat.Ann. sec. 99.096(2) (West 1982). County election supervisors charge 10 cents per signature to cover the costs of verifying the petitions, but they may use random sampling techniques which reduce the number of signatures checked and therefore the cost. Fla.Stat.Ann. sec. 99.097(1)(b) (West

1982). Although filing fees may be waived, there is no provision for waiver of the 10-cent charge for minority parties. Id. at sec. 99.097(4). Plaintiffs have cited no cases holding that states must provide free access to the ballot in all circumstances. That minor parties must incur some expenses in accumulating the necessary signatures to qualify for the ballot does not constitute an equal protection violation. American Party of Texas v. White, 415 U.S. at 793-94, 94 S.Ct. at 1312-1313.

In local elections, independent candidates may be listed on the ballot by filing petitions signed by 3% of the voters in that district. Fla.Stat.Ann. sec. 99.0955 (West 1982).[2] In

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2. The petitioning requirements imposed

contrast, sec. 99.096(1) requires minor parties to file the local 3% petition

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on independent candidates provide:

> A candidate for an office elected on a statewide basis shall obtain the signatures of a number of the qualified electors equal to 3 percent of the registered electors of Florida, as shown by the compilation by the Department of State for the last preceding general election. When joint candidacies for the offices of Governor and Lieutenant Governor are provided by law, independent candidates for the offices of Governor and Lieutenant Governor shall form a joint candidacy, and only one petition shall be used to place both names on the ballot as otherwise provided in

plus qualify by the statewide 3% petition. Plaintiffs rely on Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979), to challenge

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this section. A candidate for any federal, state, county, or district office to be elected on less than a statewide basis shall obtain the signatures of a number of the qualified electors of the district, county, or other geographical entity equal to at least 3 percent of the total number of the registered voters of the district, county, or other geographical entity represented by the office sought, as shown by the compilation by the Department of State for the last preceding general election.

Fla.Stat.Ann. {99.0955(2)(West 1982).

this distinction. That case does not support plaintiffs' position. The Illinois statutes required independent candidates or new political parties to obtain more signatures to run for mayor of Chicago than were required to run for statewide office. The Court stated that when a state has determined that a smaller number of signatures in a larger political unit serves its interests, the larger signature requirements for candidates seeking local offices cannot reasonably be justified. 440 U.S. at 186-87, 99 S.Ct. at 991.

[11-13] Plaintiffs' real complaint is that a minot political party may not run a candidate in a local election without first obtaining access to the state's general election ballot through the 3% statewide petitioning requirement. The district court

correctly recocgnized that the qualitative difference between an independent candidacy and a party candidacy justifies differences in treatment. Storer v. Brown, 415 U.S. at 745, 94 S.Ct. at 1286. With an independent candidate, a state is free to assure itself he or she is "truly independent". Id. at 746, 94 S.Ct. at 1287; MacBride v. Askew, 541 F.2d 465, 468 (5th Cir.1976). When candidates list a party affiliation, however, the voters and the state are entitled to some assurance that particular party designation has some meaning in terms of a "statewide, ongoing organization with distinctive political character." Storer v. Brown, 415 U.S. at 7455, 94 S.Ct. at 1286. Requiring a party to meet the 3% requirement on a state basis helps achieve this goal. It protects the

party's name and platform against use of unauthorized, truly independent candidates who seek to play off the party's success for their own benefit.

We discern no error in the district court's disposition of plaintiffs' remaining challenges to some 15 other provisions of the Election Code, including chapter 101 in its entirety. Plaintiffs do not seriously challenge the decision below as to some of these sections, and their arguments as to others are without merit.

As a final matter, we hold the district court did not err in dismissing Ed Clark for lack of standing. The court clearly had authority to do so, as standing is an aspect of justiciability under Art. III of the United States Constitution. Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204-2205, 45

L.Ed.2d 343 (1975). Clark, a resident of California, ran for United States President in 1980 as the Libertarian Party's candidate. He was on the ballot in Florida. He testified at trial that he is not presently a member of the Libertarian Party of Florida, is not presently a candidate for office in Florida or anywhere, and has no present intention to run for office again. Thus, he has not alleged such a personal stake in the outcome of this controversy as to warrant his invocation of federal court jurisdiction. Warth v. Seldin, 422 U.S. at 498, 95 S.Ct. at 2204-2205 (citing Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962)).

Defendants moved this Court to dismiss Alan R. Turin as an appellant because the issues are moot as to him. To the contrary, however, the case is one

where the controversy is "capable of repetition, yet evading review." Storer v. Brown, 415 U.S. at 737 n. 8, 94 S.Ct. at 1282 n. 8 and authorities cited therein. The motion is denied.

AFFIRMED.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

LIBERTARIAN PARTY OF FLORIDA,
an unincorporated association,
et al,

Plaintiffs,

vs. No. 81-491-Orl-Civ-EK

STATE OF FLORIDA, GEORGE
FIRESTONE, as Secretary of
State and Chief Election
Officer of the State of Florida,
et al,

Defendants.

_____/

O R D E R

In accordance with the memorandum opinion filed this date, it is hereby,

ORDERED and ADJUDGED that this cause having proceeded to final hearing, and

plaintiffs having failed to demonstrate the invalidity of the challenged statutes, this action is dismissed on the merits, and the Clerk of the Court is directed to prepare and enter judgment in favor of defendants, State of Florida, George Firestone, Betty Carter, Jane Carroll, and David Leahy and against plaintiffs, Libertarian Party of Florida, Alan Turin, William Marina and Doug Ramsey.

DONE and ORDERED in Chambers at Orlando, Florida, this 4th day of May, 1982.

/s/Elizabeth A. Kovachevich

U. S. District Judge

Copies mailed to

counsel of record.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

LIBERTARIAN PARTY OF FLORIDA,
an unincorporated association,
ALAN, TURIN, WILLIAM MARINA,
DOUG RAMSAY, and ED CLARK,

Plaintiffs,

vx. No. FLORIDA,

GEORGE FIRESTONE,
as Secretary of State and Chief
Election Officer of the State of
Florida, BETTY CARTER, as Supervisor
of Elections of Orange County, JANE
CARROLL, as Supervisor of Elections
of Broward County, and DAVID LEAHY,
as Supervisor of Elections of Dade
County,

Defendants.

_____/

MEMORANDUM OPINION AND ORDER

In this action the plaintiffs seek declaratory relief pursuant to 28 U.S.C. §2201, alleging that Florida's Election Code as applied to them violates the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983. The Court has jurisdiction over the parties and the subject matter under 28 U.S.C. §1343.

The plaintiffs 1/ are the Libertarian Party of Florida, which is the officially affiliated state party organization for the National Libertarian Party; Alan Turin, an announced candidate for the Florida State House of Representatives in the next general election as a candidate

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1/ An additional party plaintiff, Ed Clark, was dismissed from this suit for lack of standing.

of the Libertarian Party of Florida, who resides in Dade County, Florida; William Marina, an announced candidate for the position of State Commissioner of Education for the State of Florida, who resides in Broward County, Florida, and Doug Ramsay, who is chairman of the Libertarian Party of Florida.

The principal issues involved in this action deal with state legislation restricting access to the ballot by minor political parties and their candidates. Two distinct and fundamental rights are burdened by restrictions on access to the ballot, "the right of individuals to associate for the advancement of political beliefs, and the right of voters, regardless of their political persuasion, to cast their votes effectively." Williams v. Rhodes, 393 U.S. 23, 30, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968).

Burdens on such fundamental rights may be upheld only when "they are necessary to further compelling state interests." American Party of Texas v. White, 415 U.S. 767, 780-781, 39 L. Ed.2d 744, 94 S. Ct. 1296 (1974); Storer v. Brown, 415 U.S. 724, 736, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974); Williams v. Rhodes, supra, 393 U.S. at 31. However, "even when pursuing a legitimate interest, a state may not choose means that unnecessarily restrict constitutionally protected liberty." Kusper v. Pontiker, 414 U.S. 51, 58-59, 94 S. Ct. 303, 38 L.Ed 2d 260 (1963). The states must use the least drastic means to achieve their ends. Lubin v. Parish, 415 U.S. 709, 716 94 S. Ct. 1315, 39 L. Ed. 2d 702 (1974).

This court must answer two questions in passing upon the validity of the

statutes here challenged as unconstitutionally restricting ballot access; first, whether Florida's interest sought to be protected by the statutes is "compelling", and second, whether the statutes are the "least drastic means" to protect that interest.

I. CHALLENGE TO PETITIONING REQUIREMENTS FOR STATEWIDE OFFICES.

PURSUANT TO §99.096(1) Florida Statutes, (1981),2/ a minor political party may have the names of its candidates for office which are elected on a statewide basis, printed on the general election ballot in an election in which one or more of those offices will

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2/ All further references to statutes herein are to Florida Statutes (1981).

be filled if a petition requesting that the party be assigned a position on the general election ballot is signed by 3% of the registered electors of the state, as shown by the compilation by the Department of State for the last preceding general election.

Plaintiffs assert that the 3% requirement of (99.096(1) for statewise offices is unconstitutionally burdensome. There is no doubt the statute burdens fundamental rights of the plaintiffs. Therefore, as indicated, this Court must begin its inquiry by determining whether Florida has a compelling interest to be served by the statute.

In order to protect the integrity of its election process, by avoiding clogging of its election machinery through a flood of candidates and to

prevent voter confusion, Florida has enacted &99.096(1). That such interest is both legitimate and compelling is apparent from decisions of the Supreme Court.

In Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1976, 29 L.Ed.2d 554 (1971) the Court said:

> "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot - the interest, if no other, in avoiding voter confusion, deception and even frustration of the democratic process at the general election."

403 U.S. at 442.

The Court further noted in Bullock v.

Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed. 2d 92 (1971):

> "[The] state has a legitimate interest in regulating the number of candidates on the ballot.... In so doing, the state understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections... we are bound to respect the legitimate objective of the state in avoiding overcrowded ballots. Moreover, a state has an interest, if not a duty, to protect the integrity of its political process from frivolous or fraudulent candidacies." (Citations omitted) 405 U.S. at 145.

Also recognizing and confirming the compelling nature of these interests are American Party of Texas, supra, 415 U.S. at 783 n.; Storer, supra, 415 U.S. at 732; and Lubin, supra, 415 U.S. at 715.

Florida's interest being compelling, the focus of review turns to whether Florida has taken the least drastic means to protect its interest under (99.096(1). This is no easy determination for the Court; there is "no litmus paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause." Storer, supra, 415 U.S. at 730.

Under (99.096(1) Florida requires a minor political party to exhibit a "significant modicum of support" by satisfying the 3% petitioning requirement. This petition requirement must hold out something more than an

illusory promise of ballot access. "The Constitution requires access to the electorate be real, not 'merely theoretical.'" American Party, supra, 415 U.S. at 783, citing Jenness, supra. Of paramount consideration is whether a "reasonably diligent" party or candidate can be expected to satisfy the requirement. Storer, supra, 415 U.S. at 742.

According to the testimony presented at trial, the total number of signatures which must be certified in order to satisfy the petition requirement for the upcoming election (November, 1982) is 144,292. The testimony further revealed that more signatures than 144,292 must actually be obtained in order to insure that at least that number will be certified. The plaintiffs' witnesses utilized a rule of thumb of obtaining 1.5

times the 3% number in order to ensure certification of the requisite numer of signatures. Assuming that measure to be accurate, approximately 220,000 signtures need to be gathered by a minor political party to ensure compliance with §99.096(1) for a statewide office.

The Court's consideration of the burden imposed by §99.096(1) cannot, however, stop at the mere number of signatures required. It is also necessary to review what, if any, restrictions are placed on the pool of potential petition signers and the time constraints involved in obtaining the signatures.

Under the Florida Election Code, any registered elector can sign the petition regardless of party affiliation, voting in a primary election, or having signed another party or candidate's petition.

The minor political party may obtain signatures at any time after the first Tuesday after the first Monday in January preceding the general election (this year, January 12, 1982), but prior to the 49th day prior to the date of the first primary election (this year, September 7, 1982). For this particular year a total of 188 days are available to gather signatures.

In summation, for the upcoming general election, §99.096(1) requires a 3% petition (approximately 220,000 signatures to ensure certification) to be satisfied from a relatively unrestricted pool of electors over a period of 188 days. The Court is of the opinion that the petitioning reuirement is not unconstitutionally burdensome.

The petitioning requirements of §99.096(1) are quite similar to those

involved in Jenness, supra, 403 U.S. 431 (1971). There the Court upheld the Georgia statutes requiring a petition of 5% of the registered voters at the last general election for the office in question. The signatures were to be acquired over a six-month period. Like the petition process involved in Jenness, supra,

> "[Florida] imposes no suffocating restrictions whatever upon the free circulation of nominating petitions. A voter may sign a petition even though he has signed others, and a voter who has signed the petition of a nonparty candidate is free thereafter to participate in a party primary. The signer of a petition is not required to state that he intends to vote for that candidate at the election. A person who has

previously voted in a party primary is fully eligible to sign a petition, and so, on the other hand, is a person who has not even registered at the time of the previous election. No signature on a nominating petition need be notarized.

In a word, [Florida] in no way freezed the status quo, but implicitly recognizes the potential fluidity of American political life." Jenness, supra, 403 U.S. at 438.

The actual number of signatures required by §99.096(1) also compares favorably to those in Storer, where the Court noted that "gathering 325,000 signatures in 24 days would not appear to be an impossible burden." Storer, supra, 415 U.S. at 740.

Florida's 3% petition requirement has

previously been upheld in Beller v. Kirk, 328 F.Supp. 485 (S.D. Fla. 1970) aff'd sub. nom. Beller v. Askew, 403 U.S. 925 (1971). The 3% petition requirement for independent candidates has also been upheld. Kirk v. Smathers, No. TCA-78-0815 (N.D. Fla. 6/8/78), when Judge Stafford noted:

> "..., the petition method as employed in Florida has been shown by past experience to hold out something more than an illusory promise of ballot access; defendant's exhibits show that third-party candidates reached the general election ballot in both 1974 and 1976 as a result of successful petition drives. as the Supreme Court has pointed out, the lesson of "[p]ast experience [is] a helpful, if not always an unerring

guide." Storer v. Brown, supra, at 742." (e.s.).

Plaintiffs point out that Florida does not provide for ballot position based upon a party's candidate polling a certain percentage of the vote in the last general election. Plaintifs attempt to distinguish Jenness on this basis.

In Jenness, the Georgia statutes involved provided that any political organization whose candidate polled 20% or more of the vote becomes a "political party" with ballot position rights. Although Florida does not provide a similar means of ballot access, it does provide an alternative method of ballot access by registering 5% of the total number of registered voters as party members. Upon obtaining the 5% registration, the party is considered a

"major political party" and entitled to automatic ballot position. 3/

Plaintiffs complain that their candidate could win an election, in fact, poll 100% of the vote, and still have to satisfy the 3% petition requirement for the next election. In such event, however, the party would almost certainly have little difficulty in satisfying the 3% petition requirement. More importantly, the party would be in a position in which obtaining the 5% registration requirement would be feasible, thereby obtaining major party

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3/ The term "major political party" is not defined in the Florida Election Code, but may be defined by a reverse reading of the definition of "minor political party" in §97.021(14).

status and automatic ballot access.

Florida's lack of a method for obtaining ballot position by polling a percentage of the vote, in light of the alternative of automatic ballot position by the 5% registration method, does not lessen the Court's reliance upon the decision in Jenness, supra.

In summation, Florida's interest in restricting ballot access is a compelling one. The petitioning requirement is an acceptable means of restricting such access. More than an illusory promise of ballot access is held out by §99.096(1) to those minor political parties which possess a "significant modicum of support." Although any set percentage figure is necessarily arbitrary, the Court cannot say that Florida's 3% requirement goes beyond the least drastic means of protecting its compelling state

interest. The requirements of §99.096(1) for statewide office elections are constitutional.

II. CHALLENGE TO THE PETITIONING REQUIREMENT FOR LOCAL OFFICES.

Under §99.096(1) a minor political party may have the names of its candidates for offices which are elected on less than a statewide basis printed on the general election ballot in an election in which one or more of those offices are to be filled if such party has qualified by petition to have a slate of candidates for offices elected on a statewide basis printed on the ballot, and if such petition requesting that the party be assigned a position on the general election ballot is signed by 3% of the registered electors of the district, county, or other geographical entity represented by the office, as

shown by the compilation by the Department of State for the last preceding general election.

Plaintiffs assert that this part of §99.096(1) is discriminatory, by claiming that it requires a minor political party candidate to obtain the 3% statewide petition, in addition to the 3% local petition, while an independent candidate, and a major party candidate, are not required to do so.

Plaintiffs misread the requirements of the statute. It is the minor political party, not the candidate, which must satisfy the petitioning requirements. By misstating the operation of the statute, plaintiffs attempt to unveil a scenario whereby a minor political party candidate would have to gather the 144,292 petition signatures to run for local office.

Plaintiffs real complaint is that a minor political party is not allowed to run a candidate for a local election without first obtaining access to the general election ballot through the 3% statewide petitioning requirement.

Under §99.096(1) a minor political party qualifies for <u>statewide</u> ballot position through the 3% petition, not for a particular district or county. Once the 3% statewide petition is satisfied, the the minor political party may run a full slate of candidates for statewide office and may run local candidates in those localities within which it has also satisfied the 3% requirement. That a minor political party desires to only run local candidates or to run less than a full slate of candidates does not constitutionally obligate the state to provide a lower standard of ballot access

to it. See, Hudler v. Austin, 419 F. Supp 1002, 1013 (E.D. Mich.), affirmed Allan v. Austin, 430 U.S. 924, 97 S.Ct. 1541, 51 L.Ed.2d 769.

A major political party is given automatic ballot position in local elections because of its established strength. The independent candidate, however, must obtain a 3% petition within the district. {99.0955. The disparate treatment between the independent candidate and the minor political party inlocal elections is warranted because an independent candidacy and a party candidacy are totally different. This difference was well acknowledged by the plaintiffs' witnesses' testimony that running as an independent instead of under the party name was completely unacceptable. As stated in Storer, supra,

"[The] political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other. A new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office. From the standpoint of a potential supporter, affiliation with the new party would mean giving up his ties with another party or sacrificing his own independent status, even though his possible interest in the new party centers around a particular candidate for a particular office." Storer, supra,

415 U.S. at 745.

Plaintiffs have not even attempted to argue a constitutional right for a political party to obtain ballot position for purely local elections on a less restrictive basis than is required by the Florida Election Code. Instead, plaintiffs appear to misread the operation of §99.096(1) in an effort to raise an equal protection issue of a minor political party candidate's treatment versus the treatment of an independent candidate. As indicated, it is the minor political party, not the candidate, that is subject to the statute. The Court finds the plaintiffs' challenge to §99.096(1) on the grounds set forth in this part of this memorandum opinion to be without merit.

III. CHALLENGE TO THE PETITIONING REQUIREMENTS FOR PRESIDENTIAL CANDIDATES.

Under {103.021(3), a minor political party may have the names of its candidates for President and Vice President printed on the general election ballots if a petition is signed by 1% of the registered electors of Florida, as shown by the compilation by the Department of State for the last preceding general election.

Plaintiffs challenge the 1% petitioning requirement as unconstitutionally burdensome. The analysis involved in Part I of this memorandum opinion is applicable here, since we are dealing with restrictions to ballot access.

Florida's interest in protecting the integrity of its election process is the same here as under {99.096(1) and that interest is a compelling one. The inquiry, then, is whether {103.021(1)

imposes the least drastic means of protecting the interest.

The Court is of the opinion that the 1% petitioning requirement is not unconstitutional. Again, Florida imposes no restrictions over those eligible to sign the petition. The time allowed for gathering signatures appears to be more than adequate. Although the 1% figure is necessarily arbitrary, it is well within the parameters set forth in the Supreme Court decisions. Storer, supra, 415 U.S. at 739, n. 10. It is also worth noting that Ed Clark satisfied the requirements of §103.021(3) for the 1980 election as a Libertarian party candidate.

The Court cannot say that Florida's 1% requirement goes beyond the least drastic means of protecting its compelling state interests. The requirements of §103.021(3) are

constitutional.

IV. REMAINING CHALLENGES TO THE FLORIDA ELECTION CODE.

The remaining challenges to the Florida Election Code are dealt with summarily.

A. {99.103 provides for remission of a portion of the filing fees to a major political party "for the purpose of meeting its expenses." Florida requires major political parties to participate in primaries. The participation in primaries necessarily causes expenses to the major parties not incurred by minor political parties. The partial financing by the state, through the remission of filing fees, of these expenses is not a denial of equal protection. See American Party of Texas, supra, 415 U.S. at 791-794.

B. {{100.061, 100.071, 100.81, 100.91, 100.096, 100.101, 100.102,

101.021, and 103.101 all deal with primary elections. Plaintiffs have failed to demonstrate how their exclusion from the primaries constitutes invidious discrimination. This challenge is without merit. See American Party of Texas, supra, 415 U.S. at 781-782.

C. §103.021 does not exclude minor political parties from the process of nominating presidential electors and is not unconstitutional as asserted by plaintiffs.

D. §103.091 does not exclude minor political parties from representation by state executive committees and is not unconstitutional as asserted by plaintiffs.

E. §100.111 does not exclude minor political parties from participating in special elections to fill vacancies and is not unconstitutional as asserted by

plaintiff.

F. Chapter 101 of the Florida Election Code. Plaintiffs' broadside attack on this Chapter has failed to demonstrate any basis for a claim of invidious discrimination. The Chapter is not unconstitutional as asserted by plaintiffs.

DATED at Orlando, Florida, this 4th day of May, 1982.

/S/ Elizabeth A. Kovachevich
U. S. District Judge

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CASE NO. 83-2033

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

LIBERTARIAN PARTY OF FLORIDA, an unincorporated association; ALAN TURIN; WILLIAM MARINA, DOUG RAMSAY; and ED CLARK;

Petitioners,

vs.

STATE OF FLORIDA; GEORGE FIRESTONE, as Secretary of State and Chief Election Officer of the State of Florida; BETTY CARTER, as Supervisor of Elections of Orange County; JANE CARROLL, as Supervisor of Elections of Broward County; and DAVID LEAHY, as Supervisor of Elections of Dade County;

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENTS STATE OF FLORIDA, GEORGE FIRESTONE, BETTY CARTER AND JANE CARROLL'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Court of Appeals for the Eleventh Circuit departed from the essential requirements of law; specifically:

A. Whether the Circuit Court correctly applied the "strict scrutiny" standard of review by recognizing the compelling interests of the State of Florida and balancing those interests against the means used by the State to regulate ballot access for minor political parties, as defined in the Florida Election Code.

B. Whether the Circuit Court correctly concluded that, in its totality, Florida's system of ballot access for minor political parties constitutes the least drastic method for effectively protecting the State's compelling interests.

C. Whether the Circuit Court committed any reversible error.

II. Whether any conflict exists between the Circuit Court's decision and any decision of the United States Supreme Court or of any other circuit court, or whether the Petitioners have merely reargued their case made to the District and Circuit Courts below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioners based their case in the District Court below upon the First and Fourteenth Amendments to the United States Constitution. In doing so, the Petitioners posited a laundry list of statutes adopted by the Florida Legislature, appearing as part of Chapters 97 through 106, Florida Statutes, the Florida Election Code. The only statutes which the Petitioners have

properly presented to this Court for possible review are the following:

1. Section 99.096, Florida Statutes, establishing a three percent (3%) petitioning requirement for minor parties, as defined, to gain ballot access in the State of Florida.

2. Section 97.021(14), Florida Statutes, defining a "minor party".

3. Section 99.0955, Florida Statutes, providing ballot access for independent candidates by obtaining signatures of three percent (3%) of the electors eligible to vote on the race in which the independent candidate wishes to run.

As to the remaining statutes which the Petitioners continue to list here, they have not presented any argument to this Court which would establish any basis for review. The Petitioners proceeded in similar fashion in the District and Circuit

Courts below. Both Courts summarily disposed of this laundry listing of the statutes due to the lack of evidence and argument presented by the Petitioners. See pages 30 and 61 of the Petitioners' Appendix.

Particular note should be made of Section 103.021, Florida Statutes, establishing a one percent (1%) petition requirement for minor political party presidential candidates. Although the Petitioners have cited to it (see page 11 of the Petition), the balance of the Petition contains no argument whatsoever on the statute. More significantly, the Petition has not raised any issue concerning the dismissal of Ed Clark, the only Petitioner arguably with standing to raise the question concerning Section 103.021. The District Court dismissed Mr. Clark, which dismissal was affirmed by the

Circuit Court. The instant Petition has not even mentioned Mr. Clark's dismissal.

STATEMENT OF THE CASE

The Respondents State of Florida, George Firestone, Betty Carter and Jane Carroll offer the following statement of the case in order to correct and supplement erroneous statements made by the Petitioners.

The Petitioners brought suit in the United States District Court for the Middle District of Florida. The unreported decision of that Court is included in the Appendix to the Petition and speaks for itself. The District Court dismissed the Plaintiff Ed Clark for lack of standing, finding that he did not reside in Florida, did not intend to run as a presidential candidate, and had no other interest necessary to give him standing in the case.

The Petitioners have merely reargued here what was argued in the Courts below, including the laundry list of statutes (see pages 10 through 15 of the Petition). Both Courts found not only that the Petitioners failed to present any evidence concerning all these statutes but also simply misread or misrepresented the contents of those statutes.

The Petitioners have inaccurately summarized the evidence below. It should first be noted that the Petitioners have not included any part of the evidentiary record in their Appendix. The findings made by the Circuit Court below concerning the evidence therefore are unrefuted. The Circuit Court noted that the American Party had twice qualified a slate of candidates by utilizing the three percent (3%) petitioning method. Libertarian Party of Florida v. State, 710 F.2d 790, 795 (11th

Cir. 1983). Contrary to the Petitioners' claims that it was virtually impossible for them to meet the three percent (3%) petitioning requirement, the evidence clearly established that they failed to make any effort whatsoever to attempt to meet it. Id. As they did in the lower courts, the Petitioners seem to force a comparison between the Florida Election Code and election statutes in other states. Many of the Petitioners' contentions are nothing more than restatements of the contents of the statutes of Florida (for example, requiring a three percent (3%) petition for every election, in the absence of obtaining permanent ballot access by five percent (5%) registration). The statement on page 16 of the Petition that Florida does not permit obtaining a large portion in one

geographical locality is totally inaccurate. As the Circuit Court noted:

> "There are no geographical limitations on the number of signatures which can be gathered from a certain area. A party can thus concentrate its petition efforts in populated areas."

710 F.2d at 794.

The opinion of the Circuit Court reflects conclusions far different than the Petitioners' representation to this Court concerning the testimony offered by the state and the local Supervisor of Elections Betty Carter concerning the compelling interest involved. That opinion reflects the Petitioners' concession that the State has an interest in regulating the election process and avoiding voter confusion. 710 F.2d at 793. The Circuit Court went to some length in its opinion to reflect the "totality" of Florida's three percent (3%) petitioning system, expressly noting those

parts of the statute that "ease a party's ability to obtain signatures". 710 F.2d at 794.

The Circuit Court responded directly to the comparison of the independent candidate versus the minor political party slate of candidates. Beginning at page 795 of the opinion, the Circuit Court affirmed the District Court's recognition of the qualitative difference between an independent candidacy and a party candidacy.

The Circuit Court rendered its opinion on July 29, 1983. Petitioners timely filed a Motion for Rehearing which was denied on March 12, 1984. In addition to those matters previously mentioned in the Statement of the Case, the Circuit Court affirmed the District Court's dismissal of Ed Clark for lack of standing. The Circuit Court also denied the Motion to Dismiss the

Petitioner Alan Turin made on the ground that he had since qualified and run for office as an independent rather than as a Libertarian candidate.

REASONS FOR DENYING THE PETITION

QUESTION I.

THE CIRCUIT COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW. THE COURT CORRECTLY APPLIED THE "STRICT SCRUTINY" STANDARD OF REVIEW IN CONCLUDING THAT THE STATE OF FLORIDA HAD COMPELLING INTERESTS IN REGULATING ITS ELECTIONS AND HAD, CONSIDERING ALL APPLICABLE PROVISIONS, ADOPTED THE LEAST DRASTIC MEANS FOR PROTECTING THOSE INTERESTS.

The Circuit Court noted early in its opinion affirming the District Court that it was "applying what appears to be rather settled law" (emphasis added). 710 F.2d at 792. The Respondents submit that the Circuit Court was eminently correct. The Circuit Court correctly applied numerous decisions of this Court. In doing so, the

Circuit Court did not depart from the essential requirements of law and committed no error.

The Petitioners continue to insist that the District Court and the Circuit Court were ignorant of the "strict scrutiny" test, or, if aware of it, they refused to apply it. The Petitioners use the phrase repeatedly but never offer any logic or explanation as to their meaning when they espouse the "strict scrutiny" test.

The Circuit Court's opinion clearly contradicts the Petitioners' claim that the Circuit Court ignored the test. In fact, the Circuit Court expressly recognized this as the very issue which the Petitioners desired to raise. The Circuit Court acknowledged the Petitioners' contention that "the District Court erred in applying an incorrect level of scrutiny to appraise the challenged statutes". 710 F.2d at

792. From this point, the Circuit Court analyzed the "strict scrutiny" standard in a very well-reasoned and logical fashion, acknowledging and applying numerous cases germane to the issues.

The Respondents do not dispute that this case arises in the context of fundamental constitutional rights; namely, the right to vote and the right to associate. The Respondents have never disputed that the proper analysis of the case required the determination of the State's compelling interest in regulating its elections with a subsequent analysis of the means adopted by the State to protect its interests, balanced against the effect on the fundamental rights involved.

There can be little dispute that Florida's interests in regulating its elections constitute compelling

interests. As the Circuit Court stated at page 793 of its opinion:

> "That these, and the other interests asserted, are compelling has been well established under decided cases."

The interests indicated to the Circuit Court by the record in this case were added to the following compelling state interests which have been recognized by this Court: (1) avoiding voter confusion, (2) avoiding deception, (3) avoiding frustration of the democratic process at the general election, (4) preventing the clogging of the State's election machinery, (5) assuring that the general election winner is the choice of the majority, or at least a strong plurality, of those voting, (6) avoiding the expense and burden of runoff elections, (7) avoiding overcrowded ballots, (8) protecting the integrity of the State's political process from frivolous or

fraudulent candidacies. Clements v. Fashing, 102 S.Ct. 2836; 73 L.Ed.2d 508, 517 (1982); American Party of Texas v. White, 415 U.S. 767, 782 (1974); Bullock v. Carter, 405 U.S. 134, 145 (1972); and Jenness v. Fortson, 403 U.S. 431, 432 (1971).

The Circuit Court turned next to the "least drastic" means aspect of the standards. Adopting the language and rationale of this Court in a number of similar cases, the Circuit Court found that the "least drastic" means test posed a very practical, logical test. The Circuit Court first noted that any fixed percentage or number of signatures required would necessarily be arbitrary and probably impossible to defend, in an absolute sense, because any fraction of a percent less or one fewer in number "would not leave the interest of the State unprotected". 710

F.2d at 793-94 It is here that the Circuit Court, as has this Court, turned to the "totality" of the petitioning system involved.

Beginning at page 794, the Circuit Court noted the following aspects of the Florida system which eased the petitioning requirement for minor parties:

1. No restrictions on persons eligible to sign petitions, other than that they be registered voters in the State (which, according to the evidence presented, allowed an unrestricted pool of approximately 4.8 million registered voters who could sign the petition).

2. No party restrictions.

3. No limit on the number of petitions for parties which could be signed by any one registered voter.

4. No restrictions due to any primary election participation.

5. No geographical limitations.

6. No limitation on the number of signatures which would be submitted to satisfy the three percent (3%) requirement.

7. 188 calendar days in 1982 available to solicit and obtain signatures.

8. Petition cards provided free of charge.

9. Random sampling used to test the validity of petition signatures.

10. A nominal charge of ten cents ($.10) for each signature randomly checked.

Lastly, the Circuit Court turned to what is probably the only "litmus" test concerning ballot access petition cases. The Circuit Court felt compelled to consider whether Florida's statutes would act to "freeze the status quo". 710 F.2d at 794. The American Party qualified a slate of candidates in Florida in both 1974 and 1976 under the same statutory

requirements. This conclusively established that Florida law does not freeze the status quo but provides a realistic means of access. This "realistic means of access" as a test in such cases is based upon prouncements of this Court in cases such as Clements v. Fashing, supra (which proposed the test of whether the election laws made it "virtually impossible"), and American Party v. White, supra. See also Williams v. Rhodes, 393 U.S. 23 (1967)(the precursor to all subsequent independent minor party election cases).

The fact that terms such as "reasonableness", and considerations such as the possibility versus the impossibility of obtaining ballot access, appear in cases analyzing ballot access is no evidence of any abandonment or misapprehension of the strict scrutiny test. Rather, it simply

reflects the desire to provide greater certainty in the standards to be applied so that the result reached by the various courts will produce some consistency.

The Circuit Court also properly distinguished between the individual, independent candidacies and the party status which permeates this entire case. The Circuit Court directly applied the teachings of this Court in Storer v. Brown, 415 U.S. 724 (1974). The Court held there that the qualitative difference between an independent candidacy and a party candidacy justifies differences in treatment. This same rationale has been applied by other courts. See Dart v. Brown, 531 F. Supp. 135 (E.D. La. 1982), aff'd 717 F.2d 1491 (5th Cir. 1983); and Hudler v. Austin, 419 F. Supp. 1002 (E.D. Mich. 1976), aff'd sub nom. Allen v. Austin, 430 U.S. 924 (1977). These cases appear dispositive of

the Petitioners' contention that there is no legally supportable reason for the distinction between an independent candidate and his opportunity to collect petition signatures according to the geographic limits of the race involved, versus a minor political party candidacy. As Section 99.096 makes clear, once the Libertarian Party of Florida obtains the three percent (3%) statewide petition, it may run a slate of candidates. See Arutunoff v. Oklahoma State Election Bd., 687 F.2d 1375, 1380 (10th Cir. 1982), cert. denied 103 S.Ct. 1892 (1983). For example, if William Marina, the Libertarian's so-called "announced" candidate for commissioner of Education, obtained the three percent (3%) amount (which would also be the same requirement for an independent candidate), any other candidate the Libertarian Party nominated and convinced

to run could also run for statewide elective office.

More importantly, if, during the course of obtaining three percent (3%) for the statewide requirement, the Libertarian Party also obtained three percent (3%) on a local, or district-wide basis, the party could run a slate of candidates within that locality or district. In other words, once the required number of signatures was obtained, the party could run a candidate in each race within that locality or district. This would produce a far greater advantage for the party over an independent candidate, who would be limited to running in the single race for which he or she qualified. As a matter of fact, the single name petition card system provided for in the Florida Statutes promotes the ability to identify the origin of signatures on a local or district wide basis, thereby

facilitating the qualification of a minor party on a local and district basis while simultaneously permitting its qualification on a statewide basis. See Kirk v. Smathers, Case No. TCA 78-815 (N.D. Fla. 1978)(an unreported case validating the single signature card system).

It is highly debatable that the Petitioners even presented a case that was ripe for controversy. Neither the Libertarian Party nor any individual candidate made any effort whatsoever to qualify for office. In other words, neither the Party nor any individual candidate enjoyed the status of a diligent candidate. The decisions of this Court clearly demonstrate the importance of diligence. In Storer v. Brown, supra at page 742, the Court stated that the focal point of inquiry was ". . .could a reasonably diligent candidate be expected to satisfy

the signature requirements. . .?". In cases such as Williams v. Rhodes supra, and Anderson v. Celebrezze, 103 S.Ct. 1564 (1983), the record clearly reflected that the party or the candidate involved had satisfied the substantive requirements of the ballot access system being challenged.

Anderson v. Celebrezze points out another critical distinction here. With the dismissal of Ed Clark as a proper party plaintiff, no party plaintiff represents any election interest outside of intrastate concerns. The Petitioner Libertarian Party of Florida is an organization limited to the State of Florida. The remaining individual Petitioners except Doug Ramsay "announced" to run for intrastate offices in Florida. The Anderson case strongly suggests that presidential election cases must be more strictly scrutinized than cases involving intrastate considerations

because of the impact of presidential cases on a national scale.

The Petitioners' insistence on comparing the Florida system of ballot access for minor parties with that of other states has little persuasive effect. The Circuit Court rejected such comparisons, noting at page 794 that the federal courts should not impose legislative judgments of other states on a sister state. The Petitioners have continually asked that the federal judiciary intervene in legislative matters properly vested in the Florida Legislature without any showing that they have been diligent in their efforts to satisfy its requirements and, more importantly, without showing any evidence or argument which would invalidate the Florida system.

QUESTION II.

THE PETITIONERS HAVE FAILED TO PRESENT TO THIS COURT ANY CONFLICT WITH DECISIONS OF THIS COURT OR DECISIONS OF ANY OTHER CIRCUIT COURT OF APPEALS.

Rule 17 of the Rules of this Court sets forth considerations governing review on certiorari. Rule 17.1(a) indicates that one significant consideration will be whether the decision sought to be reviewed conflicts with another decision of a federal court of appeals or a state court of last resort. (The question of whether the Circuit Court has departed from the accepted and usual course of judicial proceedings has been argued under Question I.)

The Circuit Court has very clearly followed the precedents established by this Court and has ruled consistently with all other courts of appeals which have considered these issues. The Eleventh

Circuit now joins the Fifth and Tenth Circuits in ruling that state ballot access systems are valid against contentions by state Libertarian Parties' contentions that their right to vote and associate are impacted without any overriding state interest and that independent candidates are discriminatorily favored over minor parties. Dart v. Brown, supra; and Arutunoff v. Oklahoma State Election Bd., supra.

The Petitioners have cited only one circuit court opinion in their Petition, McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980). The percentage required under the North Dakota statutes, being reviewed in McLain, exceeded that of Florida's (3.3 percent versus 3 percent). That opinion was based on the "totality" of the ballot access requirements. The Eighth Circuit concluded that the early filing deadline

was a more significant factor than the percentage required. Id. at 1164&1167. That Court was also greatly troubled by the lack of success of minor parties. Id. at 1165. McLain has been distinguished in the Dart decision. 717 F.2d at 1500.

The Florida petition ballot access system has already been reviewed and upheld several times by the federal judiciary. In Beller v. Kirk, 328 F. Supp. 485 (S.D. Fla. 1970), aff'd sub nom. Beller v. Askew, 403 U.S. 925 (1971), the New Party challenged Florida's petitioning system. The district Court rejected challenges claiming invidious discrimination against minor parties. See also MacBride v. Askew, 541 F.2d 465 (5th Cir. 1976). The federal judiciary has also reacted favorably to certain specific aspects of the Florida petitioning system, such as the single signature card system, among others.

Wilson v. Firestone, Case No. TCA 80-880 (N.D. Fla. 1980), aff'd 623 F.2d 345 (5th Cir. 1980); and Kirk v. Smathers, supra.

It is quite clear that the Circuit Court was eminently correct in observing that it was "applying what appears to be rather settled law". Each appropriate court in the federal judiciary has had an opportunity to consider challenges to the Florida petitioning ballot access system, without success at any level. Further, there is clearly no conflict between the Eleventh Circuit's opinion and the opinion of any of its sister courts. The Eleventh Circuit has applied the previous rulings of the United States Supreme Court unerringly.

The Petitioners in fact ask this Court to overrule its previous decisions. No clearer voice could be heard to oppose this result than the Eleventh Circuit. The Circuit Court, applying the principles

expressed in Storer v. Brown, supra, observed that there were recognized differences between a party candidate and an independent candidate. Applying the same case, the Court correctly concluded that federal courts are not free to impose legislative judgments concerning the election process of any state. The Petitioners ask this Court to overturn an entire ballot access system, surviving still after challenges going back at least 12 years, for the sole purpose of permitting an "announced" candidate of the Libertarian Party of Florida to run without showing any modicum of support and to be able to have himself advertised as a member of the Libertarian Party of Florida even though he might be the only candidate of the Party in the entire State. This Court has not been willing to so demean the

concept of a political party and should not be willing to do so now.

CONCLUSION

For the foregoing reasons, the Respondents State of Florida, George Firestone, Betty Carter and Jane Carroll respectfully request this Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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